

Internal Revenue Service

memorandum

CC:TL-N-4074-91

Br4:RJBasso

date: **MAR 01 1991**

to: District Counsel, Denver SW:DEN

from: Assistant Chief Counsel (Tax Litigation)

subject: [REDACTED]

This is in response to your February 21, 1991 request for formal tax litigation advice in the above-entitled action.

ISSUE

Where the petition as to the years [REDACTED], [REDACTED] and [REDACTED] was dismissed for lack of jurisdiction on the mistaken basis that no notices of deficiency were issued as to this non-filer and the decision has become final, should the Service now issue second notices of deficiency for those years?

CONCLUSION

The Service should issue second notices of deficiency for [REDACTED], [REDACTED] and [REDACTED].

DISCUSSION

Petitioner is a non-filer who petitioned the years [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. Copies of the deficiency notices for those years were not included with the petition. Upon receipt of the administrative file, District Counsel found only notices of deficiency for [REDACTED] and [REDACTED]. Thereupon, respondent filed a motion to dismiss [REDACTED], [REDACTED] and [REDACTED] on the basis that no notices of deficiency had been issued for those years. Petitioner did not object and those years were dismissed for lack of jurisdiction. Almost one year later, it was discovered that notices of deficiency for [REDACTED], [REDACTED] and [REDACTED] had been issued and that upon default, the deficiencies had been assessed. You have instructed that the assessments be abated. At this point, you are contemplating one of two courses of action. Either the issuance of new notices (which would be timely) or motioning the Tax Court (out-of-time) to vacate the earlier decision on the basis of mutual mistake. We support the former course of action.

We agree with your observation that notices of deficiency at this time would not be prohibited second notices under I.R.C. § 6212(c). While the respondent was mistaken earlier, the dismissal for lack of jurisdiction on the basis that no notices

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were issued does not prevent the timely issuance of notices at this time. With respect to second notices generally, see Jones v. United States, 889 F.2d 1448 (5th Cir. 1989) and the cases cited therein.

The foregoing is preferable to attempting to obtain the vacating of the decision of dismissal. The only possible grounds would be either mutual mistake or that the Tax Court actually had jurisdiction (in other words, the reverse of the situation where after finality, it can be shown that the court lacked jurisdiction). Your request notes that mutual mistake of fact was held to form a basis to vacate a final decision out-of-time in Reo Motors, Inc. v. Commissioner, 219 F.2d 610 (6th Cir. 1955). However, subsequent decisions cast strong doubt on the continuing precedential value of Reo Motors and we agree with those cases. See CCDM (35)4(15)3(2); Hamilton, Are Errors in "Final" Tax Court Decisions Correctable?, 71 J. Tax'n 172-174 (September 1989) (copy enclosed). Furthermore, it is unclear whether or not mutual mistake of fact can be shown under the facts of this case. As to the aspect that the Tax Court actually possessed jurisdiction, there is nothing in our view that the respondent could do at this time. Contrast this situation with the situation described in CCDM (35)4(15)3(3) where after finality it can be shown there is lack of jurisdiction over the subject matter or the parties and any decision would therefore be "void."

Issuance of a second notice of deficiency was accomplished in Ward v. Commissioner, 907 F.2d 517 (5th Cir. 1990), a case which held the first notice of deficiency invalid because it was not mailed to the taxpayers' last known address. Inasmuch as the period of limitations was open on a Form 872-A consent and the invalid notice would not terminate that consent, the Fifth Circuit acknowledged the Commissioner's ability to issue a second (valid) notice of deficiency even though under the Fifth Circuit's holding the Tax Court petition would have to be dismissed for lack of jurisdiction on the basis that no valid notice of deficiency was issued. (b)(5)(DP)

¹ Apparently the Tax Court still considers Reo Motors viable, citing it with approval in Campbell v. Commissioner, T.C. Memo. 1988-105.

² (b)(5)(DP)

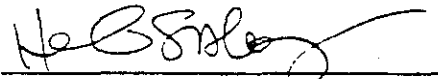
(b)(5)(DP)

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Under the circumstances, we agree with your first suggested course of action that the Service issue second notices of deficiency for [REDACTED], [REDACTED] and [REDACTED].

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(Tax Litigation)

By:


HENRY G. SALAMY
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Enclosure:
As stated